

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TIFFANY HILL,

Plaintiff,

v.

XEROX CORPORATION,

Defendant.

CASE NO. C12-0717-JCC

ORDER

This matter comes before the Court on Defendants' Motion for Partial Summary Judgment (Dkt. No. 59), Defendants' Motion Requesting Permission to File Surreply (Dkt. No. 86), the parties' motions to strike, and Plaintiff's Motion for Class Certification (Dkt. No. 39). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES the motion for partial summary judgment (Dkt. No. 59), DENIES the motion to file surreply (Dkt. No. 86), GRANTS IN PART the motions to strike, and GRANTS IN PART the motion for class certification (Dkt. No. 39) for the reasons explained herein.

I. BACKGROUND

Defendants operate call centers, also referred to as strategic business units ("SBUs"). (Dkt. No. 56 at 5.) At these call centers, agents respond to calls for third-party clients such as phone companies, airlines, and hotels. (Dkt. No. 39 at 9–10.) This case concerns five call centers

1 in Washington: one in Federal Way, one in Lacey, one in Spokane, and two in Kent. (*Id.* at 9.)
2 The Lacey and Federal Way call centers are operated by Livebridge, Inc., and the Kent and
3 Spokane centers are operated by Xerox Commercial Solutions, LLC (“XCS”). (Dkt. No. 56 at 5.)

4 Plaintiff seeks to certify two classes implicating two different call-center practices. The
5 first class relates to Defendants’ use of a compensation system known as the Achievement Based
6 Compensation (“ABC”) plan. The second relates to Defendants’ alleged failure to pay agents for
7 off-the-clock work. (Dkt. No. 39 at 8.)

8 Under an ABC plan, an agent’s compensation derives from several sources. Specifics of
9 particular plans vary, but the general premise is as follows. Agents record the time they spend on
10 different activities. Some activities—such as trainings and meetings—are compensated on an
11 hourly basis. (Dkt. No. 39 at 15; Dkt. No. 56 at 7–8.) Compensation for these activities is called
12 “Additional Pay” and neither party suggests that this case implicates the compensation rate for
13 these activities. (Dkt. No. 39 at 15; Dkt. No. 56 at 7–8.)

14 Another source of compensation for agents is “ABC Pay.” (Dkt. No. 56 at 7–8.) To
15 receive this piece of their compensation, agents track all time spent in certain activities, such as
16 receiving calls or performing follow-up work. Some of these activities—such as receiving
17 inbound calls—are paid on a per-minute basis, and each minute is referred to as a “production
18 minute.” (Dkt. No. 56 at 8.) Agents also record their time for “non-productive” activities, which
19 can include activities like waiting for a call. (Dkt. No. 57, Ex. A-2 ¶ 11.) These non-productive
20 activities are not compensated on a per-minute basis. Instead, an employee’s compensation based
21 on production minutes is totaled for the week. (Dkt. No. 39 at 16.) The employee’s number of
22 hours during a workweek on all activities—those that are compensated on a per-minute basis and
23 those that are not—are then added together. (*Id.*) The hourly rate is calculated by dividing the
24 employee’s compensation for per-minute activities by the total number of hours worked on all
25 activities. (*Id.*) If that hourly rate is less than the minimum wage, employees receive “subsidy
26 pay” to ensure that the hourly rate on a per-week basis meets the minimum wage. (Dkt. No. Ex.

31 at 3; Dkt. No. 56 at 8.) Plaintiff alleges that this system of compensation violates Washington’s minimum-wage laws.

This case also concerns Defendants’ alleged practice of failing to pay employees for all work required as part of their duties. Plaintiff alleges that agents perform two types of work that are not compensated. First, Plaintiff alleges that employees must be prepared to answer calls at the beginning of their shift times, but that they are not compensated for the pre-shift time it takes to login and start the computer programs necessary to be prepared to answer calls. (Dkt. No. 39 at 19–22.) Second, Plaintiff argues that Defendants fail to pay employees for post-call, follow-up work, such as processing customer requests and inputting information. (*Id.* at 22–25.) Plaintiff alleges that Xerox limits the amount of time employees may spend in “after-call” status and that agents must perform follow-up time on an uncompensated basis to complete this work. (*Id.*)

II. DISCUSSION

A. Motion for Partial Summary Judgment

Defendants seek summary judgment on three related issues:

- (1) Whether the Federal Way compensation system complies with the minimum-wage requirements of Wash. Rev. Code § 49.46.020;
- (2) Whether the Federal Way compensation system complies with the overtime requirements of Wash. Rev. Code § 49.46.130; and
- (3) Whether Plaintiff was properly paid for her recorded hours in compliance with the minimum-wage and overtime requirements.

(Dkt. No. 59 at 3–4.)

1. Standard on Summary Judgment

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that may affect the case’s outcome. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine if there is enough evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* at

1 49. At the summary judgment stage, evidence must be viewed in the light most favorable to the
2 nonmoving party, and all justifiable inferences must be drawn in the nonmovant's favor. *See*
3 *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 960 (9th Cir. 2011).

4 2. *Minimum-wage Requirements*

5 Washington's Minimum Wage Act requires that employers pay wages at established
6 minimum rates. *See* Wash. Rev. Code § 49.46.020. For workers who are paid hourly, the hourly
7 rate must meet or exceed the minimum wage, a fact that Defendants recognize. (Dkt. No. 59 at
8 17–18.) *See Alvarez v. IBP, Inc.*, 339 F.3d 894, 912 (9th Cir. 2003) (citing Washington cases and
9 discussing reasons for concluding that Washington courts were likely to adopt a per-hour
10 standard for hourly employees). For workers who are paid on a commission or piecework basis,
11 the right accrues across the workweek, a fact which Plaintiff never contests. (Dkt. No. 94 at 19.)
12 *See* Wash. Admin. Code § 296-126-021. In other words, the issue on summary judgment—
13 although neither party straightforwardly puts it this way—is whether the Federal Way workers
14 are hourly employees (as Plaintiff contends) or pieceworkers (as Defendants contend), and thus
15 whether the right to a minimum wage accrues on an hourly or weekly basis.

16 The parties disagree about how to characterize the ABC plan at Federal Way, but they
17 agree that it includes the three types of pay described in the background section: additional pay,
18 ABC pay, and subsidy pay. (Dkt. No. 59 at 6–8; Dkt. No. 94 at 10.) They also agree that Federal
19 Way uses “production minutes” as the relevant unit of production. (Dkt. No. 59 at 4; Dkt. No. 94
20 at 8.) Federal Way previously used calls as a production unit. (Dkt. No. 62 ¶ 5.) Around 2009,
21 the plans changed to use production minutes instead of calls. (*Id.*) This change was in part
22 because the contract with Verizon—the sole Federal Way client—was based on production
23 minutes, and in part because agents were concerned about the unfairness of paying the same
24 amount for a call regardless of whether it lasted one minute or thirty minutes. (*Id.*)

25 In the absence of any state decision considering such an issue, the Court concludes that
26 the Federal Way employees are hourly workers, because “production minutes” are simply

1 calculations of units of time. Piecework employees are “paid a fixed amount per unit of work”
2 *see* Wash. DLI Admin. Policy ES.A.8.2 at 2 (piecework employees are “paid a fixed amount per
3 unit of work”), but agents being paid for “production minutes” are being paid based on precise
4 units of time. In Defendants’ words: “a production minute . . . is effectively (with certain limits)
5 the number of seconds spent on calls, on hold, and on after call work.” (Dkt. No. 59 at 4.)

6 The Court is sympathetic to Defendants’ policy arguments and the reasons why the
7 system was established in this manner. The Court is also sympathetic to the general proposition
8 that the division between hourly workers and pieceworkers may fail to reflect the contours of the
9 modern working world. (Dkt. No. 59 at 13 n.9.) But were this Court to accept Defendants’
10 description, every employer could pay hourly workers a “per-minute” rate and thereby avoid the
11 Washington law governing workers paid on a per-hour rate. Defendants functionally suggest as
12 much in arguing that the weekly analysis must be used “whenever an employee is paid ‘on other
13 than an hourly basis.’” (Dkt. No. 59 at 16.) By this reasoning, an employer could even label each
14 hour a “unit of work” and readily turn hourly pay into piecework pay. Yet just as a worker paid
15 an hourly rate is paid a certain amount for the precise amount of time worked, a worker paid by
16 the “production minute” is paid a certain amount for the precise amount of time worked.¹

17 Defendants cite no case in which workers being paid based on precise calculations of
18 units of time are considered pieceworkers, nor has this Court found any. Instead, Defendants
19 point to a Washington state case in which drivers would earn pre-established amounts of time for
20 completing certain duties, regardless of how long the actual duties took. (Dkt. No. 59 at 13–14
21 (citing *Cf. General Teamsters Local 174 ex rel Gasca v. Safeway, Inc.*, No. 63006-7-I, 156 Wn.

22
23 ¹ In other contexts, courts have contrasted systems based on units of time from systems
24 based on units of work. *See, e.g., Washington v. Miller*, 721 F.2d 797 (11th Cir. 1983) (citing the
25 Farm Labor Contractor Registration Act, which describes two types of workers, those employed
26 on a time basis, who must record units of time, and those employed on a piece-rate basis, who
must record the number of units of work performed); *W.W. Cross & Co. v. N.L.R.B.*, 174 F.2d
875 (1st Cir. 1949) (discussing the definition of wages and describing forms of remuneration in
terms of “per unit of time worked or per unit of work produced”).

1 App. 1003, slip op. at *4 (Wash. Ct. App. May 17, 2010).) A system equating certain tasks to
2 pre-established units of time is very different than one that measures the precise amount of time a
3 task takes. The former may resemble a piecerate system, but the latter more closely resembles an
4 hourly system.

5 The Court therefore DENIES summary judgment on this claim. This reasoning and the
6 Court's conclusion that this system is not a piecerate system also renders summary judgment
7 appropriate on Defendants' related claims concerning overtime requirements, recorded hours,
8 and the derivative claims. (Dkt. No. 59 at 21, 22, 24.) Summary judgment is therefore DENIED
9 on these as well.

10 **B. Defendants' Motion to Strike and Request for Permission to File Surreply**

11 Defendants move to strike significant portions of the declarations attached to Plaintiff's
12 motion for class certification. (Dkt. No. 56 at 17–18.) Defendants also move to strike large
13 portions of Plaintiff's Reply. (Dkt. No. 83 at 2.) Plaintiff in turn moves to strike a declaration
14 from Defendants' attorney listing record citations for "facts of relevance in this case," which
15 Plaintiff claims is argumentative. (Dkt. No. 76 at 19–20.) Plaintiff also moves to strike a number
16 of references to various records related to key cards and security badges. (Dkt. No. 76 at 20.)

17 A motion to strike is proper when a pleading contains "any redundant, immaterial,
18 impertinent, or scandalous matter." Fed. R. Civ. Proc. 12(f). Applying this standard, the Court
19 STRIKES the assertions in the Reply stating that Defendants and their attorneys coerced
20 employees to sign the declarations. The declarations do not support these claims, and Plaintiff's
21 inflammatory characterizations are inappropriate under Rule 12(f).

22 Defendants move to strike allegedly conclusory assertions in four agent declarations
23 submitted with the Reply. (Dkt. No. 83 at 3.) In these declarations, four callcenter workers
24 describe how "polic[ies] or practice[s]" caused them to sign in early. Defendants claim that these
25 allegations are not supported by personal knowledge. In support of the motion to strike,
26 Defendants cite two cases. In *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304 (9th Cir.

1 1977), the district court denied certification when the complaint mimicked the language of Rule
2 23, the only supporting affidavits were from trial counsel, and counsel admitted that the party
3 could not support any facts with personal knowledge. *Doninger*, 564 F.2d at 1309. In *Brown v.*
4 *Citicorp Credit Services, Inc.*, 2013 WL 4648546 (D. Idaho 2013), the court disregarded
5 affidavits from North Carolina employees who purported to testify to the policies in an Idaho call
6 center without any personal knowledge. Neither of these cases supports Defendants' argument
7 that employees cannot describe what they understood the policies to be at the call centers at
8 which they worked. (Dkt. No. 83 at 3.) The Court DENIES the motion to strike. The Court does
9 conclude, however, that there is no suggestion that the employees had knowledge of any policy
10 or practice beyond the call centers at which they worked and interprets the affidavits
11 accordingly. The Court also notes that, as described below, it gives some declarations less weight
12 because of the detail—or lack thereof—contained within.

13 The Court DENIES Plaintiff's motion to strike the declaration from Defendants' attorney.
14 (Dkt. No. 76 at 19–20.) The summary is not as argumentative as the example in the case on
15 which Plaintiff relies, and the Court concludes that it is appropriately described as a “summary.”

16 Defendants move to strike a range of additional statements. The Court recognizes that
17 Plaintiff makes numerous questionable semantic leaps. Questionable semantic leaps, however,
18 are not a basis for a motion to strike. Defendants' arguments for striking material are about the
19 nature of the evidence and the accuracy of Plaintiff's language in describing that evidence. The
20 Court declines to engage in the laborious exercise of making meta-characterizations about the
21 nature of each of these semantic choices before even reaching the merits of the arguments.
22 Moreover, the Court notes that Defendants' submissions are by no means models of semantic
23 clarity or forthrightness,² and that both parties are guilty of relying on conclusory statements.
24 The Court DENIES Defendants' requests to strike, as well as Plaintiff's request to strike certain

25
26 ² The Court also notes that the declarations from Defendants include some from
individuals with no apparent relation to this lawsuit.

1 statements as conclusory.

2 Defendants request permission to file a surreply addressing a number of issues:
3 subclasses, certification of a CPA class, arguments related to the ABC plan being void,
4 arguments claiming that ABC plans are not piece-rate plans, and arguments that there are no
5 liability issues regarding compensation. (Dkt. No. 99.) The Court DENIES the motion to file a
6 surreply. There has already been a round of summary-judgment briefing in this case addressing
7 the primary issue upon which Defendants request permission to discuss. Other issues are
8 rendered moot by this Court's conclusions below. Moreover, the "new" subjects raised in the
9 Reply are largely responses to Defendants' arguments. Plaintiff was not required to anticipate
10 Defendants' arguments, and the failure to do so does not justify another round of lengthy
11 briefing.

12 The Court notes that both parties expended considerable effort parsing statements to
13 strike in the other party's declarations. In turn, this Court spent considerable time engaged in
14 line-by-line analysis of tangential issues attempting to identify the few genuine complaints from
15 both parties. Neither party is blameless. The energy expended by all parties involved would
16 undoubtedly have been more productive had it been directed to clarifying the substantive
17 discussion.

18 **C. Motion for Class Certification**

19 Under Rule 23, a plaintiff must demonstrate that she has met each of the requirements of
20 Rule 23(a) and at least one of the requirements of Rule 23(b). *Lozano v. AT&T Wireless Servs.,*
21 *Inc.*, 504 F.3d 718, 724 (9th Cir. 2007). Rule 23(a) requires: "(1) the class is so numerous that
22 joinder of all members is impracticable, (2) there are questions of law or fact common to the
23 class, (3) the claims or defenses of the representative parties are typical of the claims or defenses
24 of the class, and (4) the representative parties will fairly and adequately protect the interests of
25 the class." Fed. R. Civ. P. 23(a). Plaintiff seeks to satisfy only the requirements of Rule 23(b)(3),
26 which requires that the common questions of law and fact predominate over those questions

1 affecting individual members, and that a class action be a superior method for “fairly and
2 efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). (Dkt. No. 39 at 31.)

3 Plaintiff’s motion for class certification proposed two classes:

4 (1) The ABC Class – All current and former Customer Care Assistants, Customer
5 Service Representatives, or Agents who have worked at Defendants’ Washington
6 call centers under an “Activity Based Compensation” or “ABC” plan that paid
7 “per-minute” rates for certain work activities between June 5, 2010 and the date
8 of final disposition of this action.

9 (2) The Off-the-Clock Class – All current and former Customer Care Assistants,
10 Customer Service Representatives, or Agents who have worked at Defendants’
11 Federal Way, Lacey, Spokane, and Kent call centers between June 5, 2010 and
12 the date of final disposition of this action.

13 (Dkt. No. 39 at 8.)

14 *1. The ABC Class*

15 There is no argument that the proposed ABC class meets the requirements of numerosity,
16 commonality, and adequacy. (Dkt. No. 56 at 19–21 (arguing only typicality).) The Court agrees
17 with the parties that the legality of the ABC pay system in Washington presents a legal issue
18 capable of classwide resolution. (Dkt. No. 39 at 25.) The ABC class consists of approximately
19 10,000 current and former call-center workers (Dkt. No. 39 at 26–27), and there is no dispute
20 that the interests of the class will be adequately protected.

21 There is, however, disagreement about whether Ms. Hill’s claims and defenses are typical
22 of those of the class. “Under [Rule 23’s] permissive standards, representative claims are ‘typical’
23 if they are reasonably co-extensive with those of absent class members; they need not be
24 substantially identical.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). The
25 parties agree that at least some agents who started after September 27, 2012, and signed
26 arbitration agreements will be prevented from participating in this class action (Dkt. No. 56 at
21; Dkt. No. 76 at 14 n.11), but there is no suggestion that this is a significant enough number of
agents to preclude certification on the basis that Ms. Hill is atypical. *Cf. Spann v. AOL Time
Warner, Inc.*, 219 F.R.D. 307 (S.D.N.Y. 2003) (plaintiffs were not typical of a class consisting of

1 “numerous members” who had signed various releases). Nor does this Court believe that the
2 other concerns Defendants raise—such as Ms. Hill’s length of tenure or whether she “saw an
3 ABC plan”—suggest that she is atypical in a manner that should preclude certification.

4 Defendants also argue that common issues do not predominate over individual issues. *See*
5 Fed. R. Civ. P. 23(b)(3). Their argument on this issue largely mirrors the arguments they make
6 for summary judgment. (Dkt. No. 56 at 23–25.) This Court has already concluded that a
7 “production minute” is an exact measurement of a unit of time and that agents are therefore
8 better viewed as hourly workers. Accordingly, the Court finds unconvincing Defendants’
9 argument that agents’ interpretations of the ABC plans creates individualized issues. The parties’
10 contractual interpretations are only relevant if one initially assumes that the contract complies
11 with the law. *See* Wash. DLI Admin. Policy ES.A.5 (“An employer must pay minimum wage,
12 regardless of any employee agreement to work for less.”). Having concluded that agents are
13 hourly workers, any contract for that hourly wage to be determined on a weekly basis would fail
14 to comply with minimum-wage laws.

15 The parties agree that the settlement in *Sump v. ACS* bars some claims. Plaintiff argues
16 that no *Sump* class member released any claims after June 4, 2010, so there is therefore no
17 overlap with her proposed class, while Defendants appear to argue that claims were not released
18 until September 2010. (Dkt. No. 76 at 14; Dkt. No. 56 at 21.) The parties are directed to file the
19 settlement agreement under seal and either (1) jointly file a stipulation defining a class that
20 accounts for the *Sump* settlement; or (2) in the absence of any agreement, each file a brief not to
21 exceed three pages explaining how the proposed class should account for the *Sump* settlement.
22 This should be completed by August 1, 2014.

23 Plaintiff also seeks certification for CPA claims based on the language in the ABC plans
24 being allegedly unfair and deceptive. (Dkt. No. 76 at 10.) They do not explain how these claims
25 would be litigated on a classwide basis and include minimal discussion of these claims. In the
26 reply brief, Plaintiff for the first time relies on *Kirkpatrick v. Ironwood Comm., Inc.*, No. 05-

1 1428-JLR, 2006 WL 2381797 (W.D. Wash. 2006), but that case dealt with public solicitations.
2 *See id.* at *12. In these circumstances, Plaintiff has not met her burden of demonstrating that the
3 Rule 23 requirements are met. *See Doninger v. Pacific N.W. Bell, Inc.*, 564 F.2d 1304, 1308 (9th
4 Cir. 1977) (party seeking to have a class certified bears the burden of demonstrating that
5 statutory elements are satisfied). The Court DENIES certification of the CPA claims.

6 2. *The Off-the-Clock Class*

7 There are two aspects to Plaintiff's off-the-clock claims: first, that Defendants failed to
8 pay agents for pre-shift work; second, that Defendants failed to pay for "follow-up" work that
9 employees had to perform during breaks and before or after shifts. (Dkt. No. 39 at 19, 22.) The
10 Court addresses them in turn. The Court focuses here on the commonality requirement of Rule
11 23(a)(2) and the predominance and superiority requirements of Rule 23(b)(3), because the Court
12 concludes that these are fatal to Plaintiff's claims, rendering consideration of other factors
13 unnecessary.

14 As to the pre-shift off-the-clock claims, the Court concludes that there are common
15 questions and that a classwide proceeding would "generate common answers apt to drive the
16 resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (citing
17 Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97 (2009)).
18 Defendants characterize the issue as one of whether each agent had "sufficient" time to log in
19 and state that this is necessarily an individual analysis that requires answering "how much time
20 was needed, for what, was it employer directed or personal preference, did it vary, and did SBU
21 management permit it." (Dkt. No. 56 at 20.) This characterization, however, needlessly
22 complicates and obscures Plaintiff's central contention that employees were expected to be ready
23 to answer calls at the beginning of their shift, and that being prepared to answer calls required
24 logging into certain programs that took time for which employees were not compensated. The
25 Court concludes that answering this central contention would drive the resolution of the
26 litigation.

1 Turning to the predominance and superiority questions of Rule 23(b)(3), the Court
2 concludes that Plaintiff has failed to establish that the common questions predominate over the
3 individual ones. The Court agrees with Defendants that this case is very similar to *Ginsburg v.*
4 *Comcast Cable Communications Management LLC*, 2013 WL 1661483 at *5 (W.D. Wash. Apr.
5 17, 2013). In *Ginsburg*, the court considered similar off-the-clock claims from call-center agents.
6 Concluding that the common claims did not predominate, the court recognized that the evidence
7 “reveal[ed] a variety of means by which supervisors imposed [a common efficiency] pressure . . .
8 and a variety of ways in which [agents] responded to that pressure.” *Ginsburg*, 2013 WL
9 1661483 at *5. The court also recognized that when the workday began—and how to determine
10 when each class member’s daily work began—varied across individuals. Further, the plaintiffs in
11 that case had “propose[d] no manageable way to calculate damages.” *Id.* at *7.

12 Similarly, here, any common efficiency pressure was implemented by different managers
13 and supervisors. The declarations provided by Plaintiff contain varying descriptions of how long
14 it took to log into programs and how long they spent after logging out. The declarations contain
15 differing descriptions of the policies, with some describing individual supervisors who required
16 them to arrive early—although no declaration identifies any instruction to work off-the-clock—
17 and others referring only to generic policies and practices, without describing the source of the
18 individual’s belief about the existence of the policy. In considering whether these declarations
19 demonstrate that common issues predominate, the Court gives little weight to assertions from
20 employees who give no explanation for why they believed particular policies existed without any
21 description of the source or enforcement of these policies. Plaintiff also never attempts to address
22 disparities among the different tracking systems at the call centers and differences in how long,
23 for example, it would take to log in.

24 These individual issues exist even before considering the declarations from Defendants.
25 See *Ginsburg*, 2013 WL 1661483 at * 6 (recognizing reasons to be skeptical of any employee
26 declarations, but concluding that the anecdotal evidence, including declarations from the

1 defendants, suggested that individual questions could not be addressed with common proof). The
2 agent declarations provided by Defendants only reinforce the existence of individual issues about
3 what employees were told, what options were available for recording their time, and the
4 uncertain source or existence of the alleged policies concerning working off the clock.

5 Also like in *Ginsburg*, Plaintiff has failed to demonstrate any methodology for
6 determining damages and have “propose[d] no manageable way to calculate damages.”
7 *Ginsburg*, 2013 WL 1661483 at *7. Plaintiff cites cases approving class-wide aggregate damage
8 formulas, but does not address the widely varying factors influencing how much time, if any,
9 agents spent performing off-the-clock work. Based on the conflicting anecdotal evidence,
10 significant individualized issues concerning damages would undermine the use of an aggregate
11 damage formula. *Cf. Alvarez*, 339 F.3d at 901 (district court relied on representative evidence
12 when there were only “somewhat discrepant job-specific donning and doffing rates”); *Reich v. S.*
13 *New England Telecomms., Corp.*, 121 F.3d 58 (2d Cir. 1997) (representative evidence sufficed
14 when there was “actual consistency among [the] workers’ testimony”).

15 **III. CONCLUSION**

16 For the foregoing reasons, Defendants’ motion for summary judgment is DENIED,
17 Defendants’ motions to strike are GRANTED IN PART, Plaintiff’s motions to strike are
18 DENIED, Defendants’ motion to file surreply is DENIED, and Plaintiff’s motion for class
19 certification is GRANTED IN PART. The parties shall file the *Sump* settlement agreement under
20 seal and (1) either file a stipulation defining a class that accounts for the *Sump* settlement; or (2)
21 each file a brief not to exceed three pages explaining how the proposed class should account for
22 the *Sump* settlement. This should be completed by August 1, 2014.

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1 DATED this 10th day of July 2014.

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8 John C. Coughenour
9 UNITED STATES DISTRICT JUDGE
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